United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1341

To be argued by
ALLYNE R. ROSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1341

UNITED STATES OF AMERICA,
Appellee,

—*against*—

MARIO DE LUCIA and ANGELO GERBASIO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

The appellants, Mario DeLucia and Angelo Gerbasio, appeal from judgments of conviction entered July 9, 1976 in the United States District Court for the Eastern District of New York (Dooling, *J.*) after a jury trial convicting them of both counts of a two count indictment. The first count charged aiding and abetting and theft of goods in foreign commerce in violation of 18 U.S.C. § 659 and § 2. The second charged a conspiracy to steal and possess those goods in violation of 18 U.S.C. § 371. Appellant Gerbasio appeals his conviction on both of the counts. Appellant DeLucia appeals only his conviction on the conspiracy count.

DeLucia was sentenced to concurrent terms of six months imprisonment, to be followed by three years probation. Gerbasio was sentenced to concurrent terms of three months, also to be followed by three years probation. Both appellants are presently enlarged on bail.

In substance, appellant Gerbasio presents three claims on appeal: (1) that his post-trial statements should have been suppressed because there was no probable cause for his arrest and because they were tainted by a prior statement which preceded his *Miranda* warnings; (2) that the trial court abused its discretion in redacting his post-arrest statement rather than granting a requested severance; related to this is a claim that, under the circumstances, it was improper to admit into evidence a similarly redacted statement of his co-defendant, DeLucia; and (3) that the evidence was insufficient to support the jury's verdict.

Appellant DeLucia's sole claim is that there was insufficient evidence to convict his co-conspirator, Angelo Gerbasio and that, therefore, his conspiracy conviction must be reversed.

Statement of Facts

A. The Trial

1. The Theft and The Arrests

On October 17, 1975, appellant Mario De Lucia, an employee of Pan American World Airways at Cargo Building 67, John F. Kennedy International Airport, approached Joseph Simon, one of his co-workers on the midnight shift, and spelled out his detailed plans to steal cargo from the company on the following Wednesday, October 23, 1975. (12-15).* Knowing that Simon had recently been married (42-44), De Lucia offered him $200 to $250 for his assistance (14).

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* References preceded by "H-5/5" and H-5/6" refer, respectively, to the transcript of the May 5 and May 6, 1976 suppression hearing. All other numbered references are to the trial transcript.

De Lucia related the following plan to Simon: On the night of the theft, October 23, De Lucia would contact Simon and designate the cargo to be stolen from storage in Cargo Building 67. Simon, whose job it was to handle such cargo, was assigned the role of moving the chosen freight from the cargo area to a position near the doors at loading bays 7 and 8. De Lucia, who worked in ground transportation, would obtain the truck and back it into the area of the bay doors for loading (15-17).

In that conversation, it was also revealed to Simon that De Lucia was not alone in the scheme but had a confederate. De Lucia explained that in order to protect both Simon and this unnamed partner, he would not disclose to either the identity of the other (17, 19-20). Simon was to receive his payment only after the goods had been disposed of. Having listened to the plan, Simon agreed to cooperate (20, 22).

Minutes later, Simon reported the entire conversation to his supervisor, Jose Godoy (23-24, 71-73). Subsequently, Godoy met with the Pan American Director of Security and two special agents of the Federal Bureau of Investigation and related to them what Simon had told him (75-77, 181-82). As a result, the agents made arrangements to conduct a surveillance commencing at 12:00 a.m. on the night of the planned theft (182-83).

Shortly after midnight on October 23, De Lucia approached Simon and pointed out the freight to be stolen—31 cartons of womens coats loaded on three tow carts (25-26, 193-96). He also advised Simon that at 2:30 a.m., the time of their first coffee break, the truck would be parked near the bay doors designated by him the previous week (26-27).

A few hours later, the scheme was executed. At 2:30 a.m. Simon moved the three carts. When he arrived at

Bay 8, a Pan American truck had already been backed up to the door, and De Lucia was waiting (27-28). After De Lucia loaded the truck, he asked Simon whether he (Simon) could supply him with papers covering the shipment in the event he was stopped. Simon responded that he could not do so (29). De Lucia then moved the truck from the bay, drove it around the cargo building to the south side of the lot, parked it, and, by 2:45 a.m., had returned to work on his shift (128-30, 157).

The FBI agents conducting the surveillance observed De Lucia load and move the truck (124-28, 153-57). From the time De Lucia left the truck until 8:00 a.m. in the morning, it was under continuous FBI surveillance and no one was observed approaching it (130-31, 157-58).

De Lucia's shift was over at 7:30 a.m. At about that time Christie Weilan, the motor pool dispatcher on the day shift, requested De Lucia to work overtime. De Lucia refused, explaining that "he had something to do at home" (216, 222-23). Soon thereafter, sometime between 7:45 and 8:00 a.m., Weilan was approached by appellant Angelo Gerbasio, one of his motor pool drivers on the day shift. Gerbasio advised Weilan, his supervisor, that he had to attend a union meeting. In accordance with union contract requirements, as well as customary procedures, Weilan did not give Gerbasio any work assignment (223-24, 226).

At 8:00 a.m., immediately following this conversation, De Lucia and Gerbasio left the cargo building together and entered the truck which De Lucia had earlier loaded with the 31 stolen cartons (131, 158). Weilan, the only individual authorized to make company work assignments on the day shift on the motor pool, had not assigned either De Lucia or Gerbasio to that truck, and, in fact, had not given either of them any work assignment at all (260,

262). Nevertheless, De Lucia and Gerbasio took the truck and, with De Lucia driving, drove it to a gas pump located at the gate of the Pan American cargo area. There, Gerbasio filled the truck's tank with gas (158-59).

Fueling of the truck completed, at about 8:05 a.m., they drove off, followed by the surveillance agents. The truck, driven by De Lucia, travelled west, through Queens and Brooklyn, and then across the Verazzano Bridge to Staten Island. While still in Brooklyn, however, the truck pulled to the side of the road and, for no discernible reason, stopped for a short period; neither De Lucia nor Gerbasio exited the truck. Upon reaching Staten Island, the truck commenced what Judge Dooling characterized at the suppression hearing as "serpentine" maneuvers (H-5/6, 86): It headed down one street, turned, and retraced its steps in the opposite direction. Then, it made a variety of suspicious turns in the area of the access road to the expressway, and finally headed east, again in the opposite direction (159-61, 186). At that point, at approximately 9:20 a.m., the agents stopped the truck and made the arrests (135-37, 142-43, 161-63, 177).[1] They also checked the truck's cargo and, by identifying numbers, verified that it was the merchandise which had been stolen from Pan American (187-88).

Following the arrests, De Lucia and Gerbasio were taken to the FBI office located at John F. Kennedy Airport where they were processed, advised of their rights, and questioned. Both made statements to the agents (143-44, 163, 199-207).[2] Gerbasio's redacted statement was as follows (201-02, 214-15; Def. Ex. B):

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[1] At the pretrial suppression hearing, the surveillance agents testified that they had stopped the truck in the belief that its occupants had "made" the surveillance (H-5/5, 38-40; H-5/6, 36-39).

[2] As discussed *infra* (pp. 17-18), these statements were determined by Judge Dooling to have been voluntarily made.

"GERBASIO stated that on the morning of October 23, 1975, he came to work about 7:15 A.M. and about 8:00 A.M. was asked to help on a truck.

ANGELO [Gerbasio] stated that he had no idea where he was going and did not know the truck contained any freight. ANGELO stated that there was some conversation in the truck and he believed that he was going for a pick up at some pier in Staten Island.

ANGELO [Gerbasio] stated he could not furnish any further information:" [3]

2. Company Procedures and The Union Meeting Testimony

As noted, Christie Weilan, who was Gerbasio's supervisor and the day dispatcher for the motor pool, testified that between 7:45 and 8:00 a.m. on October 23, 1975, Gerbasio, who was the "Senior Steward" representing the members of the motor pool in the Transport Workers Union, informed him that he (Gerbasio) would be attending a union meeting (223-25). Once Gerbasio reported such a union commitment, according to standard procedures, he received no assignment until after the meeting was over. (288). However, Gerbasio remained accountable for his time. Had he informed Weilan that the meeting would not be until late in the morning, he would have been given a "short" assignment or instructed to

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[3] De Lucia's redacted statement was, in brief, that at 7:30 a.m. on October 23, Weilan asked him to work overtime; that he did not know there was any freight on the truck although, in the early morning hours, he had loaded it with freight; that he did not know where the freight was destined; and that he had been told to make a pick up from a pier in Staten Island (206-07).

function as the "office man". (230-31). But because Gerbasio never so informed Weilan he was given any assignment. Weilan, whose responsibilities included the dispatch of all motor pool workers on the day shift, never instructed or authorized Gerbasio or DeLucia to take the trip; and there was no one else who might have done so (260-62). Moreover, all motor pool assignments, without exception, are recorded (265); yet no company record reflected this trip (262). Finally, Weilan testified that even when a "helper" on a truck is assigned by the driver, established procedure requires that permission be obtained (232). In this instance it was not. Although Weilan did testify that one could take a "ride" with a fellow employee without his (Weilan's) knowledge, Gerbasio, minutes before leaving, had told Weilan that he was on his way to a union meeting; he said nothing about a trip to Staten Island with DeLucia or anyone else (266).

In Weilan's absence, the only person authorized to make motor pool assignments was Anthony Matusa, Weilan's assistant (264-65). Prior to this particular trip, however, Weilan was not absent. Indeed, he had just spoken with Gerbasio (225-26, 266). In any event, Matusa, too, testified that this assignment had not been made by him (321-23).

On the motorpool assignment sheet for the day shift on October 23, 1975, Gerbasio was listed under the heading "Standby Drivers (Random Assignment)," with the notation "54" beside his name (Gov. Ex. 12). Matusa testified that the "standby driver" status simply means that the assignment is not a fixed one (311). Moreover, all "random assignments" were made by Weilan or Matusa, and Gerbasio was given no such assignment on October 23rd (321-23). Matusa also explained that the notation "54", which had been placed beside Gerbasio's name on the assignment sheet by Weilan on the morning of October 23rd, meant "union business" (312-13, 319).

William J. Hudson, Manager of Pan American Ground Transportation, testified that he had been advised that a union meeting was scheduled for October 23, 1975. According to Hudson, it was expected that Gerbasio, the shop steward, would attend this meeting. At approximately 9:05 a.m., Hudson telephoned his immediate supervisor and learned that the union meeting had already been held at 8:00 a.m., and that Gerbasio had failed to attend this meeting. On cross-examination, Hudson, however, stated that, to his knowledge, Gerbasio had not been informed of the time of this meeting (324-29, 332).

The defense called only one witness, Elmer Clinton, who testified that he expected to meet Gerbasio at around 10:00 or 10:30 a.m. on the morning of October 23rd to discuss certain union grievances, but that Gerbasio never arrived (335-36). Neither appellant took the stand.

3. The Motions for Acquittal

At the close of the defense case, both appellants moved for a judgment of acquittal. With regard to Gerbasio, Judge Dooling stated that "though marginally, there is certain substantial evidence here from which the jury could without unreason conclude that the defendant Gerbasio was guilty beyond a reasonable doubt" (351). He also denied DeLucia's motion and stated, with regard to the conspiracy count, that "for the same reason . . . there is sufficient [evidence] to authorize and require me to give the case to the jury" (351).

B. The Pretrial Suppression Hearing

1. Probable Cause

At the hearing, the same agents who later testified at trial described the FBI investigation prior to the crime

and the surveillance of the theft. They testified in full about the events from October 21, 1975, when Special Agent Jules was first informed by Godoy, Simon's supervisor, and the Pan American Airlines Directors of Import and Security of the plans DeLucia had detailed to Simon (H. 5/6, 20-25); to the surveillance on the night of October 23rd of the loading and moving of the truck by DeLucia (H-5/5, 25-33); to the appearance at 8:00 a.m. in the morning of DeLucia and Gerbasio and the moving and fueling of the truck (H-5/5, 33-34); and, finally, to the surveillance of the truck through its circuitous route to Staten Island (H-5/5, 34-37; H-5/6, 38-39). In this regard, Agents Walsh and Jules, both of whom have had extensive experience with moving surveillances, testified that they inferred from the path taken by the truck that the defendants knew they were being followed (H-5/5, 37-40; H-5/6, 36-39). Finally, there was also testimony concerning the elaborate system of communications whereby the agents, during the course of their night-long surveillance, received various communications from Godoy, the Pan American Cargo Supervisor, indicating that the movement of the shipment and use of the truck were unauthorized (H-5/6, 5-11C, 14-15, 33-36; H-5/5, 89-90).

Based on this testimony, Judge Dooling found that there was not only "probable cause", but that "the agents had no alternative except to do exactly what they did, to follow the truck and make the arrest" (H-5/6, 85-87).

2. The Post-Arrest Statements

Agent Yoos testified that after the truck had been halted, he walked to the passenger side and, displaying both his credentials and his firearm, identified himself as an FBI agent. Gerbasio was then asked for the papers for the truck. He responded: "Ask Mario. He has them"

(H-5/6, 92-94). The testimony of Agent Jules, who accompanied Agent Yoos, was substantially similar. However, his recollection was that Gerbasio, when asked what he was doing in Staten Island, answered "Ask Mario, I'm helping him" (H-5/6, 48).[4]

After this brief exchange, Gerbasio exited the truck and Agent Yoos holstered his firearm (H-5/5, 94). Agent Jules then advised Gerbasio that he was under arrest and Agent Yoos gave him (Gerbasio) his *Miranda* warnings, which Gerbasio acknowledged that he understood (H-5/5, 94-96; H-5/6, 28). Thereafter, Agent Yoos brought Gerbasio to the other side of the truck where DeLucia was, and, while doing so, advised him again that he did not have to say anything (H-5/5, 96, 101-02).

Subsequently, both appellants were brought to the FBI Office located at Kennedy Airport for processing. Before any questions were asked Gerbasio was again advised of his *Miranda* rights and executed a written waiver of rights form (H-5/5, 102; Gov. Ex. 7). He then made the following statement, set forth in its unredacted form:

> "Gerbasio stated that on the morning of October 23, 1975, he came to work about 7:15 A.M. and about 8:00 A.M., Mario DeLucia asked him to help him on a truck. Angelo asked Mario why he wanted help, and Mario stated that he had a heavy load. Mario also told Angelo that he should not say anything to anybody, just come with him.
>
> Angelo stated that he had no idea where he was going and did not know the truck contained any

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[4] Simultaneously, Agent Westhoff had asked DeLucia where he was going. DeLucia's reply was: "Ask Angelo. I'm helping him" (H-5/5, 42).

> freight. Angelo stated there was some conversation in the truck and he believed that he was going for a pick up at some pier in Staten Island."

Gerbasio then stated that he could not furnish any further information and the interview terminated (H-5/5, 105).

At the conclusion of the hearing, Gerbasio's brief reply to the single question asked at the moment of his arrest was suppressed because he had not been given the required *Miranda* warnings. However, the district court denied the motion to suppress the statements made by both Gerbasio and DeLucia at the FBI office, concluding that they were not caused by the initial statement and were entirely voluntary (H-5/6, 128B-135). This finding was amply supported by the evidence adduced at the suppression hearing.

ARGUMENT

POINT I

There was probable cause for appellant Gerbasio's arrest and, therefore, his post-arrest statement was admissible.

Appellant Gerbasio contends that there was no probable cause to justify his arrest at the time that the truck in which he was riding was stopped by the FBI agents. Based on this contention that probable cause was lacking, he claims, in a convoluted manner, that his subsequent statements are inadmissible, under the rule of *Brown* v. *Illinois*, 422 U.S. 590 (1975). The Government contends, contrary to appellant's argument, that, as Judge Dooling held, there was ample probable cause to justify Gerbasio's arrest. Moreover, even assuming *arguendo* that probable

cause for arrest was lacking, we contend that the subsequent statement made by Gerbasio was sufficiently divorced from the alleged illegal arrest so as to purge any taint, thereby rendering the statement admissible.[5]

Turning first to the issue of whether the agents had probable cause to arrest Gerbasio, it is instructive to reiterate the classic test of probable cause set forth in *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949), quoting from *Carroll* v. *United States*, 267 U.S. 132, at 162: "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Applying this test, it is submitted that there can be no question that probable cause existed at the time the agents stopped the truck and arrested DeLucia and Gerbasio. The agents had collectively certain knowledge that a felony was in progress. Further, for the following reasons, they were fully justified in believing that Gerbasio was a participant in the crime that was being committed before their very eyes: Days before it occurred, the agents had learned of the planned theft. On the night of the theft, the agents had maintained uninterrupted surveillance of each step in its execution. They had viewed the merchandise being loaded into the truck and knew from communications with a company representative that both the taking of the shipment and the use of the truck were unauthorized. After watching the loading and moving of the truck the surveillance continued, and they knew that no one had approached it until Gerbasio and DeLucia

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[5] Inasmuch as appellant Gerbasio does not raise any issue with respect to the nature of the *Miranda* warnings or Gerbasio's understanding of them, our analysis does not include the point.

arrived at 8:00 a.m. the following morning. Then, appellants DeLucia and Gerbasio were observed moving the truck to the entrance gate of the cargo area and Gerbasio was watched fueling the truck. Finally, the vehicle was followed while it proceeded along a route and in a manner obviously calculated to avoid surveillance and interference. Believing that the surveillance had been detected, the agents stopped the truck and made the arrests.

These circumstances, we respectfully submit, establish ample cause to "warrant a man of reasonable caution" to believe that Gerbasio was committing the crime of stealing goods in foreign commerce in violation of Title 18, U.S.C. § 659, or of aiding and abetting the theft of those goods. To contend that the FBI agents, who had observed DeLucia load the truck with stolen goods, park it for a time, and then several hours later together with Gerbasio drive by a circuitous route to Staten Island, lacked probable cause to believe that both men were committing a crime borders on the frivolous. We contend that appellant's argument that no "sinister" connotation may be drawn from his gassing the truck or his presence as a passenger in the truck is misplaced. On the issue of probable cause—not on guilt or innocence [6]—it is more than sufficient that Gerbasio, during an hour and a quarter, accompanied DeLucia in the stolen truck which he had gassed before leaving. The agents knew that the truck contained the stolen goods, and had reason to believe that both were involved with this stolen merchandise. Under the circumstances, there was probable cause to arrest both men. *See, e.g., United States* v. *Fay*, 332

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[6] Discussed *infra*, in Point IV, pp. 28-29, 34-37.

F.2d 1020, 1022 (2d Cir. 1964). Cf. *Ker* v. *California*, 374 U.S. 23 (1963).[7]

Appellant's reliance upon *United States* v. *DiRe*, 332 U.S. 581 (1948), which dealt with an informant situation, is misplaced. As explained by the Court of Appeals for the District of Columbia in *Stephens* v. *United States*, 271 F.2d 832, at 835 (D.C. Cir. 1959), in *DiRe*:

> "... the only information the arresting officers had was supplied by an informer who was present at the scene of the crime and arrest. Since the informer did not in any way implicate Di Re, who was sitting next to the other defendant on the front seat of a parked car, the only circumstance upon which the police could have based the arrest was his mere presence at the scene of an illegal transaction. This the Supreme Court held was insufficient to constitute probable cause."

Here, however, the information was based on actual observations. Nor does *United States ex rel. McArthur* v. *Rundle*, 402 F.2d 701 (3d Cir. 1968), have any bearing on the instant case. There, police officers had no reason to believe that anyone in the vehicle was engaging in unlawful activity. Further, when they approached the vehicle to "investigate" and seized a brown envelope held by defendant, one of its occupants, they admittedly knew that the envelope did not contain untaxed liquor which was the claimed object of the investigation. Similarly inopposite here is *Pearson* v. *United States*, 150 F.2d 219 (10th Cir. 1945), where the court held invalid the search of an

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[7] Contrary to appellant's suggestions (Gerbasio Br., pp. 16-17), Gerbasio's statement at the time of arrest that DeLucia had the papers was not considered as a circumstance justifying the arrest.

automobile because the officers had no reason to believe that it contained contraband.

In sum, and notwithstanding the cases cited by appellant, a common-sense reading of the evidence in this case belies appellant's claim that the agents lacked probable cause for arrest. Thus, Gerbasio's post-arrest statements were properly admitted.[8]

POINT II

Gebasio's post-arrest statements were voluntarily made and were not causally related to the statement made prior to the *Miranda* warnings.

Appellant Gerbasio contends that his second statement, which was made following proper *Miranda* warnings, should be suppressed because it followed an earlier statement made upon arrest and before he was advised of these rights. Therefore, he argues, the second statement, held admissible by the district court, was "linked to the first" and should have been suppressed (Gerbasio Br. p. 22).

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[8] Assuming *arguendo* that Gerbasio's arrest was not based on probable cause, the government still contends that the statement is admissible. Although the court below did not rule on the issue, the facts as set forth above show that the statement was not only given voluntarily, but was "sufficiently an act of free will to purge the primary taint" *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963). See, *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), where the Court held: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant." Here, there was no official misconduct, there were proper *Miranda* warnings, and there was a temporal and spatial interval between arrest and the statement. The redacted statement, therefore, was properly admitted into evidence.

He points to the fact that he was not advised that his prior statement could not be used against him and that he had not been first brought before a magistrate, although this latter point was not urged below. We contend that the cases cited by appellant do not hold that a second statement by an accused, given following an earlier one made without the benefit of *Miranda* warnings, is involuntary absent advice that the first statement cannot be used in any criminal proceeding or without the accused being first brought before a magistrate.

Indeed, in *Tanner* v. *Vincent*, — F.2d — (2d Cir., Slip. op. 5267, decided August 27, 1976), this Court held that it was rejecting a "mechanistic approach" which would require:

> "an automatic finding of involuntariness with respect to any statement made in custody by an individual fully informed of his constitutional rights if at some earlier time the individual had made inculpatory remarks without the benefit of complete *Miranda* warnings unless at the subsequent interrogations that individual is specifically informed that his earlier statements are inadmissible in any criminal proceedings that may be brought against him." * * *
>
> "[W]e reject this mechanistic approach and adhere to the established rule that the voluntariness of any custodial statement must be determined from an examination of the totality of particular facts surrounding its making" (*Id.*, at 5274-75).

Thus, this Court in *Tanner*, recognizing that by his first statement Tanner had "let the cat out of the bag", nevertheless held that the "initial admissions . . . [were] only one factor bearing on the disputed issue of the voluntariness of the later, fully advised statement" (*Id.*, at 5275).

So too, here. After carefully considering the evidence, the trial court correctly concluded that Gerbasio's prior statement did not produce his later one, and that the later statement, made after he was given his *Miranda* warnings, was entirely voluntary.

The single statement made by Gerbasio prior to his advise of rights, "Ask Mario he has them", in response to a request for the truck's papers, was not a confession but was exculpatory in nature. Nor was it made in response to any prolonged interrogation. The agents, when they approached the passenger side of the truck, posed a single question regarding "the papers" and without hesitation Gerbasio responded. Certainly, we contend, the trial court correctly found that this statement was "not self-evidently inculpatory" and "not such that . . . [appellant] was committed to inevitable future talk" (H-5/6, 129-30).

Thereafter Gerbasio was twice advised of his *Miranda* rights, once immediately after the above-quoted statement and again, over an hour later, at the FBI Office. Furthermore, on each occasion, Gerbasio acknowledged that he understood his rights and, in addition, he executed a written waiver of these rights.

Moreover, as the trial court found, "the record demonstrated . . . that the waiver was not in any way extorted" (H-5/6, 115), and that there was a complete absence of "any atmosphere of persuasion to speak" (H-5/6, 136). During his interview, Gerbasio was not told that his co-defendant was being interviewed; nor was he told that his co-defendant had in any way implicated him. In fact, the agents did not mention that the truck was known to be carrying stolen merchandise until after Gerbasio had made his statement (H-5/5, 106-07).

In addition to these circumstances, the trial court also took into consideration the posture in which Gerbasio

found himself, coupled with the substance of his two statements: The court noted that the halting and circuitous route of the truck suggested that, sometime before his arrest, Gerbasio knew, at the very least, that something was seriously wrong. Thus, prior to each statement, both the one made at his arrest and the one made in the FBI Office an hour later, Gerbasio had ample opportunity to consider his situation and determine his best course of action. Also of great importance, before making the second statement, Gerbasio was twice warned of his rights—including his right to remain silent and the serious consequences flowing from choosing to speak. Yet, on each occasion, he indicated no unwillingness to talk and, indeed, displayed quite an eagerness to do so. Finally, when he did speak, his statements were clearly not intended to be inculpatory. They were both aimed, rather, at exculpating himself and placing the blame upon his co-defendant. These circumstances, as the trial court found, compel the conclusion that the statement which was made after Gerbasio was advised of his rights was the product of a deliberate choice that he made to say precisely what he said, and not the result of any psychological disadvantage flowing from his earlier statement (H-5/6, 128B-131, 135-36).

In view of this record, appellant's citation to *Harrison* v. *United States*, 392 U.S. 219 (1968), is puzzling. In *Harrison*, at the first trial, counsel had announced in his opening statement that Harrison would not testify. However, after three illegally obtained and highly inculpatory confessions, in which Harrison admitted committing the felony-murder he was charged with, were improperly allowed into evidence, he took the stand and proceeded to make damaging admissions. Under those circumstances, the Supreme Court held that it was error to admit Harrison's testimony in a subsequent trial because, as appellant here recognized, its only possible purpose was "to

blutn the effects of the confessions" (Gerbasio Br., p. 23), and, under the facts of *Harrison*, "the government [could] hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used." *Harrison* v. *United States*, *supra*, 392 U.S. at 224. By contrast, here the record shows that appellant's second statement was made in a context devoid of any coerciveness or persuasion, and that, in the totality of the circumstances, the second statement, exculpatory and not inculpatory as in *Harrison*, was not the "product" of the first. Further, contrary to appellant's suggestion, there was no "burden [placed] on the defense to show there was no attenuation" (Gerbasio Br., p. 24). As the trial court found, that burden was on the Government and was fully sustained by the Government (H-5, 6, 111-12, 135).[9]

Finally, this Court's recent decision in *United States* v. *Galante*, — F.2d — (2d Cir. Slip. Op. No. 76-1165, decided December 14, 1976) is, by analogy, helpful. Although dealing with an initial violation of the Fourth Amendment, and holding that the illegality did not "forever" render goods "immune from seizure," the Court, in footnote 14, recognized that where there has been a violation of *Miranda*, later events might still render a subsequent seizure legal. We contend that the *Galante* footnote reaffirms the viability of the *Tanner* case; the

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[9] The other authority cited by appellant, *Westover* v. *United States*, 384 U.S. 436, at 494 (1966), is equally inapposite here. There, petitioner had been in custody for 14 hours during which he had been interrogated at length by local officers without *Miranda* warnings. This ordeal was followed immediately by two and one-half hours of FBI interrogation, preceded by *Miranda* warnings. The Supreme Court held that, "[o]n the facts of this case we cannot find that [petitioner] knowingly and intelligently waived his right[s] . . ." (*Id*, at 495).

rationale being similar although different interests are perhaps involved.

Accordingly, it is submitted that, as set forth above, the totality of the circumstances supports the decision below. Hence, the statement was properly admitted into evidence.

POINT III

The trial court did not abuse its discretion in refusing to grant appellant Gerbasio a severance.

Appellant Gerbasio argues that the trial court erred in denying his request, made on the morning of trial, to have his trial severed from that of his co-defendant, DeLucia. In this regard, he suggests that the redaction of his post-arrest statement was unfair because it deleted what he characterizes on appeal as the "exculpatory" portions. Further, he claims that although the statement of his co-defendant, DeLucia, was redacted to eliminate completely all references to him, it nevertheless violated the Supreme Court's ruling in *Bruton* v. *United States*, 391 U.S. 123 (1968).

It is of course the general rule that the trial judge is afforded wide discretion in determining whether to order a severance. Indeed, this Court recently held that:

> "[When] the crime charged in the indictment is provable against all the defendants by the same evidence and the offenses arise out of the same or similar series of acts it is preferable in the interest of judicial economy to try the defendants together absent substantial prejudice to the accused. *United States* v. *Kahaner*, 203 F.Supp. 78, 80-81 (S.D.N.Y. 1962) (Weinfeld, J.), *aff'd*, 317 F.2d

459 (2d Cir.), *cert. denied*, 37[illegible] U. 836 (1963). To succeed upon appeal a d[illegible]ant must demonstrate that he suffered such prejudice as a result of the joinder, not that he might have had a better chance for acquittal at a separate trial. *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971)." (*United States* v. *Corr*, — F.2d —, (2d Cir., decided October 22, 1976) (Slip Opin., 5891-5912, at 5911).

Although *Corr* case did not specifically involve a *Bruton* issue, it restates the standard to be applied in determining whether the failure of a district court to grant a severance was error. We contend that, tested against this standard, Gerbasio's claims of prejudice are not persuasive. Indeed, far from suffering "substantial prejudice" from the redactions, it is difficult to comprehend how he suffered any prejudice at all.

A. Gerbasio Was Not Prejudiced by the Redaction of his Own Post-Arrest Statement

Appellant bases his entire argument regarding the redaction of his post-arrest statement on the assumption that the portions omitted were "exculpatory". From this premise, he argues that the redaction was unfair because it left so many questions unanswered (Gerbasio Br., p. 28); because it deleted the "innocent explanation" of his recent possession of stolen goods, thus somehow violating his 5th Amendment rights (Gerbasio Br., pp. 31-32); and because it prejudicially kept from the jury important "evidence that it could have considered in connection with the [conscious avoidance] charge" (Gerbasio Br., pp. 32-33).

Although each of these arguments is built upon the portions of his statement that were redacted, appellant tellingly fails to make any reference to what those deletions were. His reliance upon characterizations is, however, not surprising; for once the full statement is disclosed, his claims of prejudice collapse. Appellant's full statement reads as follows: [10]

> "GERBASIO stated that on the morning of October 23, 1975, he came to work about 7:15 AM and about 8:00 AM, *was* [MARIO DE LUCIA] asked [him] to help [him] on a truck. [ANGELO asked MARIO why he wanted help, and MARIO stated that he had a heavy load. MARIO also told ANGELO that he should not say anything to anybody, just come with him.]
>
> ANGELO stated that he had no idea where he was going and did not know the truck contained any freight. ANGELO stated there was some conversation in the truck and he believed that he was going for a pick up at some pier in Staten Island. ANGELO stated he could not furnish any further information."

By a simple comparison of the two versions, the first of appellant's claims—that the redactions unfairly left to much "to speculation by the jury" (Gerbasio Br., p. 28)—is easily disposed of. Contrary to his suggestion, nothing in the full statement allays the speculation engendered by his comment that he "had no idea where he was going". Nor does anything clarify or explain his belief that his destination was "some pier in Staten Island." The omitted portion does specify that his co-defendant was the one who asked him to help on the truck.

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[10] The redacted portions are shown in brackets, and the single addition is italicized.

However, the "substance of that conversation", which appellant now views as central to his defense, fills none of the gaps in his statement, and in fact, appears far more damaging to him than the redacted version, which makes clear that Gerbasio derived his belief concerning a "pick up at some pier in Staten Island" from "some conversation in the truck". Since the evidence established that his co-defendant was the only other person in the truck, the source of his information would have been clear. As to the remainder of the conversation, the alleged "explanation" that "Mario stated that he had a heavy load" is directly inconsistent with his claim, two sentences later, that he "did not know the truck contained any freight." Further, his statement that "Mario . . . told . . . [him] that he should not say anything to anybody, just come with him" is an unequivocal admission that he had, at the very least, deliberately closed his eyes to the obvious.

In view of the content of the redacted portions, appellant's second claim, that the redaction prejudicially deleted the "innocent explanation" of his possession of the stolen goods, is wholly unfounded. Further, his final argument—that the court's conscious avoidance charge "mandated in the interests of parity that the stricken portion . . . should have been left in"—is without merit.

In short, far from eliminating any exculpatory or explanatory material, the redaction benefitted appellant. Indeed, the only portion omitted which was not directly harmful to him was his accusation of his co-defendant. Were the omission of that accusation, alone, sufficient to constitute "severe prejudice", redaction would seem unavailable as a means of resolving a *Bruton* problem.

Pertinent in this regard is *United States* v. *Kershner*, 432 F.2d 1066 (5th Cir. 1970), the only authority we

have found dealing with this contention. There, the Fifth Circuit, while acknowedging that "the admission of an entire confession may be required so that exculpatory and mitigating parts will be included", concluded, after comparing the full and redacted statements, that "defendants could point to no concrete examples where any exculpatory or explanatory statements had been deleted" (*id.*, at 1072). Further, the Court held that the deletion of statements implicating a co-defendant are not *per se* invalid. The Court reasoned as follows (*id.*, at 1071):

> "Even before the Supreme Court decided *Bruton* both State and Federal courts had followed the practice of permitting joint trials in which any reference that implicated a co-defendant was omitted from confessory statements before they were submitted for jury consideration. . . . *Bruton* in nowise undertook to abolish joint trials. Rather, the rationale of the *Bruton* limitation clearly indicates that joint trials—even joint trials involving inculpatory confessions by co-defendants, were contemplated in the future.
>
> Nor is there anything in *Bruton* to justify the conclusion that the deletion of the portion of a confession which implicates a co-defendant is *per se* invalid. * * * We again hold here that, unless such a procedure distorts a confession, it may be used because it does not violate any constitutional right of the defendant to be confronted with the witnesses against him."

This Court, too, has found that redaction, when fairly accomplished, is an acceptable means of avoiding the wasteful necessity of separate trials. *United States* v. *Trudo*,

449 F.2d 649 (2d Cir. 1972), *cert. denied*, 405 U.S. 926 (1972).[11]

Since appellant has been unable to show prejudice by the redaction, there was no error in denying his last-minute severance motion.

B. Co-Defendant De Lucia's Redacted Statement in No Way Inculpated Gerbasio

Gerbasio also claims that he suffered substantial prejudice by the admission of De Lucia's post-arrest statement which, he contends, inculpated him in violation of *Bruton* v. *United States*, *supra*. Appellant fashions this claim of prejudice from an obvious slip of the tongue—and one that was instantaneously corrected and not objected to at trial.

Focusing his attention on only the final portion of De Lucia's statement, as recounted at trial by Agent Jules, appellant quotes as follows:

> [Agent Jules]: "He stated he could not remember what freight was loaded on this truck nor did he know where the truck—freight was destined to. He also stated that all he could say was that he was told to make a pick-up from the pier in Staten Island and could not furnish any further information" (207).

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[11] Appellant's citation to *United States* v. *Crane*, 499 F.2d 1385 (6th Cir. 1974), *cert. denied*, 419 U.S. 1002 (1974), is, in context, difficult to comprehend. In that case, the Court addressed itself to the fairness of a bifurcated trial, a wholly different means of preserving joint trials while complying with the mandate of *Bruton*.

From this, he argues that "the co-defendant's [De Lucia's] statement that he didn't know where he was going" gave rise to the inference "that the passenger . . . namely [Gerbasio] . . . was the navigator of the trip" (Gerbasio Br., p. 34).

But the quoted words themselves make plain that Agent Jules simply misspoke in his use of the word "truck", and immediately corrected himself by substituting the intended word, "freight". Most important, there was no objection to this inadvertent slip of the tongue. This itself makes it evident that the claim now urged is frivolous. Indeed, the testimony was clear that, at least, according to De Lucia's story, he knew his destination—he was going "to make a pick-up from the pier in Staten Island"; and, according to the earlier portion of his statement, he was doing so at the request of Weilan (206). What De Lucia claimed not to have known was "what freight was loaded on the truck" and "where the freight was destined to." Further, had this slip of the tongue not been fully clarified by Agent Jules' instantaneous correction of it, the defense would, undoubtedly, have clarified it by reference to the written version of the statement.[12]

For the *Bruton* rule to be implicated, the challenged statements must clearly inculpate the complaining co-fendant. *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). Here, the excision of De Lucia's post-arrest statement was complete. Every possible reference to Gerbasio was carefully omitted. Further, the sole claim

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[12] This statement provides, in pertinent part: "Mario stated he could not remember what freight was loaded on this truck, nor did he know where the freight was destined." (Gov. Ex. 3500-9).

that De Lucia's statement could have, in any way, indirectly or directly, inculpated Gerbasio when coupled with the circumstantial evidence, rests on what we contend is distorted reading of the record.

In short, any inference that Gerbasio was the navigator or co-navigator of the trip, "is based not on the redacted [statement] but on the other independent evidence . . ." *United States* v. *Trudo, supra*, 449 F.2d at 653. Further, since De Lucia's statement did not inculpate Gerbasio, the Fourth Circuit decision cited by appellant, *Close* v. *United States*, 450 F.2d 152 (4th Cir. 1971), *cert. denied*, 405 U.S. 1068 (1971), has no application.

Thus, the trial court's denial of appellant's motion for a severance was proper and not an abuse of its discretion.

POINT IV

There was sufficient evidence to sustain Gerbasio's conviction.

Appellant Gerbasio contends that there was insufficient evidence to sustain his conviction. Essentially he argues that the "mere presence" rule requires a reversal of the judgment of conviction. Related to this, appellant DeLucia also contends that there was insufficient evidence to prove that Gerbasio was a participant in the conspiracy. Hence, he contends that his (DeLucia's) conviction on the conspiracy count cannot stand, inasmuch as there were no other co-conspirators, named or unnamed. The Government contends that, although the case against Gerbasio was not overwhelming, there was adequate evidence adduced below from which sufficient inferences of Gerbasio's guilt could be drawn to sustain the jury's verdict.

A. The Non-Hearsay Evidence of Gerbasio's Participation

1. The Context of the Trip

Due to the somewhat unique circumstances presented by this case, the acts of DeLucia up to the point of Gerbasio's appearance at the parking lot are themselves highly suggestive of Gerbasio's complicity. Significantly, too, those acts provide the context within which all subsequent events must be viewed and evaluated.

During his 2:30 a.m. coffee break on October 23, DeLucia, (in accordance with a meticulously prearranged plan), stole 31 cartons of women's coats from 3 tow carts selected by him several hours earlier. The vehicle to be used to transport the stolen merchandise, a Pan American truck, was already waiting at Bay 8 when Simon delivered the carts. DeLucia removed the cartons from the tow carts and loaded them into the truck. Since his shift was not over until 7:30 a.m., he drove the truck to the south side of the Pan American lot, parked it, and returned to work. Because his removal of the merchandise was unauthorized, he had no documents covering the shipment.

Throughout the above activity, DeLucia was under the constant surveillance of FBI agents. Agents also maintained uninterrupted surveillance of the truck from the time DeLucia left it at 2:45 a.m. to the time of his release from work. During that period, no one approached the truck.

At the end of his shift, at 8:00 a.m., DeLucia returned to the truck. As of this time, very little remained to complete the crime that was in progress. DeLucia had only to drive the truck off the premises to some designated

destination and unload the stolen cargo. But his mission had to be accomplished quickly, since his use of the truck was completely unauthorized, leaving a clear risk that it would be assigned for legitimate company business during the day shift.

These circumstances, we submit, virtually compel the conclusion that DeLucia, when he entered the truck at 8 a.m. on October 23, was off to unload the stolen goods. At this precise moment, Gerbasio came into the picture. He entered the truck with DeLucia, and together they began their trip. Concededly, Gerbasio's "presence" at this moment may not, standing alone, warrant a finding of participation in the crime. But the circumstances preceding and surrounding his appearance do give rise to a reasonable inference that his presence and subsequent actions were directly related to DeLucia's obvious mission.

In brief, it is perhaps only unlikely that one in DeLucia's position—just departing to unload a shipment of goods stolen from his employer—would enlist the aid or company of someone not involved in the crime. However, it is highly improbable that he would risk soliciting the help of an experienced fellow employee who would undoubtedly realize that the delivery of cargo to a suspicious destination without the appropriate documentation was not within the course of legitimate company business. Further, there was no reason for DeLucia to expose himself to such risks, for he had been able to load the shipment himself.

The inference arising from the context—that both were participants in the venture—is reinforced by Gerbasio's own words and conduct.

2. The Arrangements Made By Gerbasio

The record established that sometime between 7:45 and 8:00 a.m. on October 23, after arriving at work, Gerbasio approached his supervisor, Weilan, and informed him that he was to attend a union meeting. As required by union contract and in accordance with customary procedures, this claimed commitment excused Gerbasio from any regular work assignment until he informed his supervisor that the meeting was over. Thus, by this brief conversation, Gerbasio conveniently arranged to free himself from any work-related obligations for an unspecified period of time, the duration of which was, in effect, up to him. Minutes later, Gerbasio got into the truck with DeLucia.

The testimony was unequivocal that all assignments on Gerbasio's shift were made by either Weilan, the day supervisor, or, in Weilan's absence, by his assistant, Matusa. Both testified that neither appellant was assigned to this truck, nor was either assigned to make any pickup or delivery in Staten Island. The testimony was also unequivocal that even in those rare instances when a "helper" is assigned by the driver, either the supervisor or his assistant must be informed of the helper's assignment. In view of Gerbasio's lengthy job experience and union responsibilities, it was reasonable to assume that he was cognizant of this established company procedure, and knew the requirement that any legitimate company assignment be reported to his supervisor. Yet Gerbasio, who had conversed with Weilan only minutes before departing with DeLucia, failed to mention the impending trip. From these circumstances, the jury could reasonably have inferred that Gerbasio was well aware of the purpose of DeLucia's mission, and took positive steps to free his time to participate in it, as well as to conceal his whereabouts.

Both appellants contend, on the other hand, that, in view of other testimony in the record, Gerbasio's statement that he had a union meeting is consistent with the hypotheses of innocence. In his regard, they point to the testimony of Clinton, the only defense witness, who testified that he expected to meet with Gerbasio that day, sometime around ten or ten-thirty in the morning, to discuss certain union grievances. From this testimony, appellant DeLucia argues (based, we note, on the assumption that Clinton's testimony is to be fully credited), that "[a]t most, the records show that Gerbasio was improperly getting out of work between 7:30 a.m. and the time of the 10:00 a.m. meeting." (DeLucia Br., p. 11).

This suggestion—that Gerbasio was simply "playing hookie"—itself exposes the weakness of appellant's contention that the only reasonable inferences to be drawn from the record support Gerbasio's innocence. Entirely apart from the unlikelihood that an experienced company employee, who is also a union representative, would, without reason, risk the consequences of unauthorized absence from work, it is eminently unreasonable to assume that a worker absenting himself from his job would choose to spend this improperly obtained "free time", secured not without considerable risk to his employment, riding in a company truck with another company employee to load or unload company cargo. In short, unless Gerbasio's assistance on the truck constituted legitimate company business, the only reasonable inference is that he was actively and willingly participating in the commission of the crime.

The inference of innocence that appellants draw from the union meeting testimony is also refuted by other evidence in the record. First, it should be recalled that, subsequent to his arrest, Gerbasio made a number of statements apparently intended to be exculpatory, including the claim that, when he entered the truck at 8 a.m. on October 23, he did not know where it was going.

The jury could reasonably have concluded that this claim was wholly inconsistent with the suggestion that Gerbasio planned to attend a ten o'clock meeting with Clinton. In short, Gerbasio could not have left John F. Kennedy Airport in rush hour traffic, destination unknown, expecting that he would be required to load or unload cargo at that unspecified destination, and at the same time intended to be back at the airport for a 10 a.m. union meeting.

Finally, appellants place much reliance on the testimony, elicited by defense counsel on cross-examination of Weilan, that if Gerbasio had informed Weilan that the union meeting would not take place for several hours, Gerbasio would have been given a "short" assignment or instructed to function as the "office man". Again, the jury could properly and reasonably conclude that neither a trip or unknown destination nor a trip to Staten Island in rush hour traffic qualified as a "short assignment". But even more significantly, since Gerbasio did not inform Weilan that this meeting would not occur for two hours but rather conveyed the impression that the meeting was immanent, the jury could reasonably conclude that the trip was not an "assignment" at all.

3. The Trip To Staten Island and Gerbasio's Post-Arrest Statements

As noted, at 8 a.m. on October 23, Gerbasio entered the Pan American truck with DeLucia. Initially, DeLucia drove to the Pan American entrance gate where both got out and walked to the side of the vehicle. Gerbasio then filled the tank of the truck with gas. Preparations completed, both reentered the truck and, with DeLucia driving, commenced their trip.

The route taken by the truck, under the constant surveillance of FBI agents, was aptly characterized by the

trial court as a "serpentine" one. After travelling through Brooklyn and Queens to Staten Island, the truck commenced a series of suspicious maneuvers—stopping and starting for no apparent reason, driving up and down the same street, making multiple turns near and under the expressway, and finally, commencing to retrace its steps and head back in the direction of New York City. The agents, therefore, stopped the truck and made the arrests.

Gerbasio, in a post-arrest statement intended as exculpatory, stated that he had been asked to help on a truck, but did not know its destination and did not know it was loaded. He also said that from conversations on the truck, he believed he was going to make a pickup at some pier in Staten Island. He could not, he said, furnish any further information. These statements provide the basis of a number of reasonable and, indeed, compelling inferences.

First, from his statements that he had been asked "to help on a truck" and that he believed he was "going for a pick-up", the jury could reasonably infer that, quite apart from the question of guilty knowledge, Gerbasio himself viewed his role as an active one. Far from being a "mere passenger", along only for the ride, he was admittedly present as a participant and actor.

At the same time, Gerbasio's statements were, particularly in view of the other evidence, inherently incredible. It is hardly reasonable that an experienced employee, as was Gerbasio, would leave on a purported "assignment" with "no idea" of his destination. It is even less credible that, after an hour and twenty minutes

in a truck following the particular route taken by DeLucia and Gerbasio, his assignment would be no clearer than a belief that "he was going for a pick-up at some pier in Staten Island". Indeed, the fact that Gerbasio's post-arrest statements in no way took into account the extraordinary route taken by the truck is itself highly revealing.[13] In short, this explanation was inadequate and the jury was warranted in its implicit finding that the statement was probative "substantive evidence of guilt" *United States* v. *Lacey*, 459 F.2d 86, at 89 (2d Cir. 1972).

4. The Inference Arising from Gerbasio's Joint Possession of the Truck with De Lucia

It is firmly established that "an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods." *Barnes* v. *United States*, 412 U.S. 837, 843 (1973). Further, that inference may be of controlling weight. *United States* v. *Carneglia*, 468 F.2d 1084, 1088 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973). The possession giving rise to the inference may be actual or constructive; exclusive or joint. *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972). With regard to constructive possession, the test which must be satisfied requires there to be some showing that the defendant exercised "dominion and control" over the stolen goods. *United States* v. *Carneglia*, *supra*; *United States* v. *Casalinuovo*, 350 F.2d 207 (2d Cir. 1965).

In *United States* v. *Carneglia*, *supra*, this Court had before it the question of whether the evidence adduced at

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[13] In view of both appellants' experience as truck drivers in the New York area, they understandably make no argument that the truck was lost, or that Gerbasio might have been under that impression.

trial with regard to two of the appellants, DeVita and Carneglia, justified a finding that they had possession of two trucks, containing stolen merchandise, thus invoking an inference with regard to their guilty knowledge. The activities of these appellants were limited to the following: As to the first truck, which was parked in a gas station, DeVita "had climbed into the cab of the truck, where he remained for two to three minutes, during which time the hood of the truck moved or rocked noticeably." *Id.*, at 1087. Carneglia, after earlier approaching the truck and then entering the gas station office, "returned to the truck, looked into the cab, and shut the open door on the driver's side." *Id.*, at 1087.

> "The two then drove together to the second truck. Carneglia . . . got into the cab of the second truck and started it up. Carneglia and DeVito thereafter worked together for five or ten minutes on the tailgate, which was stuck in the down position." (*Id.*, at 1087).

In *Carneglia*, there was no direct evidence that either appellant had ever looked inside the trucks or was aware that goods were stored there, no less that those goods had been stolen. The Court, nevertheless, permitted an inference that "Carneglia and DeVito had attempted to start or had started the trucks, that they attempted to repair the second truck, and that they accordingly contemplated some future personal use of the trucks . . ." Based on this inference, the Court stated:

> "We need not decide whether these inferences support the ultimate conclusion that Carneglia and DeVito each had actual possession of the trucks, for the statute also reaches constructive possession, which we have defined as such a 'nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defend-

> ant's dominion and control as if it were actual possession.' *United States* v. *Casalinuovo*, 350 F.2d 207, 209 (2d Cir. 1965). The evidence here established that necessary nexus or relationship, and it showed considerably more than the 'bare presence' condemned as insufficient in *United States* v. *Kearse*, 444 F.2d 62, 64 (2d Cir. 1971), and in other cases relied upon by appellants. Cf. *United States* v. *Massarotti*, 462 F.2d 1328 (2d Cir. 1972)."

It is submitted that here the objective indices of control are qualitatively similar to those held sufficient in *Carneglia*. Further, the additional circumstances present here buttress the proof of a nexus between Gerbasio and the truck.

While appellants would attribute no meaning to the fact that Gerbasio gassed the truck as it left the Pan American premises, it is, in context, of significance. Certainly such an act is, of itself, potentially consistent wth lack of "knowledge of what was in the truck" (DeLucia Br., p. 9); but so is fixing the tailgate or starting and stopping the motor. The point is that Gerbasio's purposeful and deliberate act to prepare the truck for a trip —the only possible purpose of which was to complete the theft, followed by the extraordinarily circuituous route taken by the truck in an obvious effort to avoid police surveillance and interference, and coupled with the reasonable inferences to be drawn from Gerbasio's post-arrest statements, including his admission that he was in the truck "to help" his co-worker, DeLucia, all establish Gerbasio's knowing joint possession of the truck with DeLucia regardless of the coincidence of who was in the driver's seat.

None of these circumstances were present in *United States* v. *Kearse*, 444 F.2d 62 (2d Cir. 1971), where the

appellant, who was simply found standing in the archway between two rooms, one of which contained stolen merchandise, was not shown to have any relation whatsoever to those in control of the premises. Similarly distinguishable is *United States* v. *Vilhotti*, 452 F.2d 1186 (2d Cir. 1971), which, as to two appellants in the case, Santa and Mercurio, contained proof only of a "momentary presence" in a garage "at least a hundred feet away from . . . the stolen cartons" (*id.*, at 1188-89).

B. Gerbasio's Participation Was Established By a Fair Preponderance of the Non-Hearsay Evidence; Hence, the Hearsay Statement to Simon Was Properly Admitted.

Even if each of the items of evidence discussed above "is susceptible of an explanation other than . . . [Gerbasio's] participation" in the crime, those "pieces of evidence must be viewed not in isolation but in conjunction." *United States* v. *Geaney*, 417 F.2d 1116, at 1121 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1969). The evident purpose of the trip to Staten Island, the arrangements for leaving made by Gerbasio, Gerbasio's conduct in preparing the truck, the highly irregular movements of the vehicle, the inference arising from his joint possession of the truck with DeLucia and the reasonable inferences to be drawn from Gerbasio's own statements—"each of [these] . . . episodes gained color from each of the others." *Id.*, at 1121, quoting from *United States* v. *Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962). When so viewed, Gerbasio's assistance to DeLucia "is not likely to be a mere coincidence" (*Id.*, at 1121). On the contrary, it provides ample proof of his participation in the conspiracy and, consequently, established a foundation for the admission against him of DeLucia's disclosure to Simon that he had a partner in

the venture who would be assisting him. *United States* v. *Geaney, supra.*[14]

C. The Evidence Was Sufficient to Support the Jury's Verdict

Once DeLucia's statement to Simon is admitted against Gerbasio, the Government's proof becomes more than sufficient to sustain Gerbasio's conviction on both counts.

A week before the contemplated crime, on October 17, 1975, DeLucia informed Simon of his plans and enlisted his aid. He advised Simon of the date of the theft, October 23, and indicated that the crime would occur on the midnight shift. DeLucia also told Simon that he had a partner. As the proof established this partner was appellant Gerbasio.

Quite the opposite of appellant DeLucia's contention (DeLucia Br., p. 9), this was plainly a carefully conceived and meticulously planned crime. Almost a week before its commission, every detail had been considered and resolved, with the exception of two items which could not possibly have been settled so far in advance—the pre-

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[14] It should be noted that Gerbasio's counsel did not object to Simon's testimony regarding his conversations with DeLucia as violative of the hearsay rule. He only objected to the statement that DeLucia had another partner, apparently on the ground that the identity of the partner had not been disclosed. Thus, because of the lack of objection, there was no express finding by the trial court that the "fair proponderance" test had been met, nor was there a request that one be made. Accordingly, it is assumed that the trial judge was satisfied that the evidence of a mutual venture was sufficient. *United States* v. *Geaney, supra,* at 1120. Gerbasio does not press this issue on appeal.

cise goods to be stolen and the precise time of the theft during the midnight shift. But even these were to be decided before the plan went into operation.[15]

Six nights later, on the midnight shift, the scheme was executed. Every aspect of the crime ran precisely according to the plan DeLucia had detailed to Simon.

In view of all the evidence, it is clear that Gerbasio's assistance to DeLucia, during the commission of the actual crime, was not a mere coincidence. Rather, Gerbasio was a full partner in the criminal venture.

Appellants rely heavily on *United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975), in contending that the convictions must be reversed. But the proof, here, as outlined above, is far more substantial than was presented in that case. In *Johnson*, the proof showed only that defendant, a youth, was present in an automobile owned and driven by his friend, Loewe, when a customs search disclosed that illegal drugs had been hidden inside a door panel of the car. There was no evidence suggesting that Lowie had a partner, that Johnson in any way contributed to the scheme, that Johnson was present in the car under any suspicious circumstances, or that Johnson would not have accompanied Lowie unless he were involved in the venture. Indeed, the evidence in that case compelled the conclusion that Loewe was operating entirely on his own, and certainly without the knowledge or participation of Johnson. For the evidence established that when Loewe

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[15] We note that although, with hindsight, DeLucia's selection of Simon was not a wise one, the record discloses a reasonable basis for his choice. On cross examination of Simon, DeLucia's attorney elicited the fact that his client knew of Simon's impending marriage. Thus, DeLucia assumed, not reasonably, that Simon was in need of the extra money.

went to purchase the drugs and pack them inside the door of his car, he left their shared hotel room at a time when Johnson was asleep. In short, *Johnson* is not analogous to the case at bar.

Indeed, *Johnson* has recently been explained by this Court in *United States* v. *MacDougal-Pena*, — F.2d — (2d Cir., Slip Op. 675, decided December 1, 1976) which stated that in *Johnson*, "there was not 'an iota of evidence' connecting Johnson to his friend's drug transactions, 513 F.2d at 823". *Id.* at 680. As has been seen, this is not the situation here.

Further, unlike *Johnson* and *United States* v. *Kearse*, *supra*, this is not a "mere presence" case. Therefore, the principle that false exculpatory statements "are insufficient proof on which to convict" (*United States* v. *Johnson*, *supra*, at 824) should have no application.

Finally, in an effort to create before this Court a "reasonable doubt", appellants have dissected each piece of circumstantial evidence in hopes of showing that the whole might be perceived as consistent with innocence. That, however, is not the standard for appellate review. Even if an innocent explanation is plausible, circumstantial evidence need not exclude all possible inferences but those of guilt. *United States* v. *Lubrano*, 529 F.2d 633, at 636 (2d Cir. 1975). Indeed, where the facts equally support inferences of guilt beyond a reasonable doubt or innocence, the jury's verdict should stand. *United States* v. *Bohle*, 475 F.2d 872, at 875 (2d Cir. 1973).

We submit that, viewed in its entirety and, as required, in the light most favorable to the government, and "giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact", the evidence here is such that "a reasonable mind might fairly conclude guilt beyond a reasonable

doubt." *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), quoting from *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). Accordingly, the verdict of the jury should not be disturbed.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: December 22, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 27th day of December, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Wm. J. Gallagher, Esq.
The Legal Aid Society
Fed. Defender Services Unit
509 U.S. Courthouse
Foley Square
New York, N.Y. 10007

Michael Washor, Esq.
16 Court Street
Brooklyn, N.Y. 11241

Evelyn Cohen

Sworn to before me this
27th day of Dec. 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4613298
Qualified in Queens County
Term Expires [illegible]